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No. 96-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Petitioners,

vs.

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY

I. THIS COURT HAS JURISDICTION BECAUSE NOTHING ON RETRIAL WILL AFFECT THE APPELLATE COURT'S LEGAL RULING ON THE MEASURE OF SET-OFF.

Despite plaintiffs' assertions to the contrary (Resp. Br. at 4-5), the finality requirement of 28 U.S.C. § 1257 is satisfied in this case. The Illinois Appellate Court ordered a new trial against Amtrak limited to the issue of damages only. (Petition (Pet.) at App. 24.) The appellate court held that on retrial, Amtrak is entitled to a set-off on account of the long term disability insurance it bought for Mrs. Van Holt because Amtrak paid for the insurance, the insurance is not a fringe benefit, and Amtrak bought the insurance intending to use the benefits to offset potential FELA liability. (Pet. at App. 23.) The appellate court further held that Amtrak's set-off on retrial will be limited to premiums paid. (Pet. at App. 24.) These are legal rulings and nothing that happens on retrial will change or otherwise affect them.

As a result, this case is one of the "recurringly encountered situations" in which the Court takes jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). To use the language of the Court in *Cox*, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings" because "[n]othing that could happen" in the damages trial "would foreclose or make unnecessary decision on the federal question." *Id.* at 480.

The question put to the Illinois Appellate Court was simple and straightforward—is set-off for disability insurance in an FELA action measured by the amount of benefits the employee received and will receive in the future or is it limited to the premiums the employer paid? The appellate court answered "premiums only" (Pet. at App. 24) and nothing on retrial will change that.

Plaintiffs disingenuously suggest that "it may well appear" that plaintiff paid for the disability insurance herself through payroll deductions and that this would somehow change the import of the appellate court's legal ruling. (Resp. Br. at 9.) There is absolutely no record support for this musing. No such contention was ever made below, either during the extensive post-trial proceedings in the trial court or during the years the case was before the Illinois courts of review. The appellate court held that *Amtrak* procured the disability insurance "voluntarily to indemnify itself against possible liabilities under the FELA" and not "for any independent reason" as a "fringe benefit." (Pet. at App. 23.)

Plaintiffs observe that in some of the cases where full-benefits set-offs have been allowed, the plan was "funded" by the plaintiff's railroad employer. (Resp. Br. at 8.) This is meaningless. Case after case holds that in determining set-off, the "purpose and nature of the fund and of the payments" controls, "and not merely . . . their source." *Burlington Northern R.R. v. Strong*, 907 F.2d 707, 713 (7th Cir. 1990) (quoting *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1381 (9th Cir. 1987)). The Illinois Appellate Court held that Amtrak's purpose in obtaining disability coverage for its employees was to

"use [the] *benefits* . . . to satisfy any liability for lost wages under F.E.L.A." (Pet. at App. 23.)

In any event, the instant record is clear that Amtrak through its premium payments also provides the "funding" for the Connecticut General disability plan. Amtrak pays a monthly premium for every non-union employee, not just for those who are disabled. (R. V7, C1533.) The insurance contract provides that the premiums are adjustable and can go up or down "from time to time" on 31 days written notice, "based upon experience." (R. V7, C1535.) Plaintiffs would have the amount of Amtrak's set-off turn on who writes the disability check. There is no support in law or logic for such a contention.

II. AMTRAK NEVER RAISED "PREEMPTION" IN THE TRIAL COURT BECAUSE IT NEVER HAD TO—PLAINTIFFS SOUGHT (AND OBTAINED) A JOINT AND SEVERAL JUDGMENT WITH THE SAME MEASURE AND AMOUNT OF DAMAGES AGAINST BOTH DEFENDANTS.

Plaintiffs complain that Amtrak never raised a "preemption" argument in the trial court, overlooking that they themselves rendered this defense unnecessary by framing their case as one of joint and several liability (Resp. Br. at 2, 10, 12) and seeking (and obtaining) the same measure and amount of damages against both the FELA and the common law defendant.

Plaintiffs also claim that they never "acceded" to imposition of the FELA measure of damages to both defendants. (Resp. Br. at 3.) But of course they did—by seeking a joint and several judgment and the same measure of damages against both defendants in the first

place. Plaintiffs even conceded in their appellate brief that the FELA damage instructions from *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), applied to both the common law and FELA defendants:

> [T]he proper instruction mandated by *Liepelt* was given to apply to *both the common law case and the FELA case.*

(Pl. Appellate Br. at 33 (emphasis added).)

In sum, plaintiffs' present claim that their "cases" against Amtrak and CUS proceeded on "separate tracks" (Resp. Br. at 13) is an after-the-fact mischaracterization of the way they framed this action from day one. Indeed, by seeking one joint and several judgment in the same amount against both Amtrak and CUS, plaintiffs not only agreed to have the FELA measure of damages apply to both defendants—they mandated this result!

Plaintiffs' argument that acceptance of Amtrak's position will lead to business invitees suing railroad stations under the FELA (Resp. Br. at 13) is preposterous. Business invitees do not have an FELA action against anyone. Plaintiff did have an FELA action against her employer Amtrak. When she elected to join that FELA action with a common law action against CUS *and to seek one joint and several judgment against both*, the Supremacy Clause required that the FELA measure of damages apply to *both*.

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